

**BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC**

In the Matter of the Application of

Mark Kipling Durham

For Review of Action Taken by

FINRA

File No. 3-21981

**FINRA’S OPPOSITION TO DURHAM’S SECOND MOTION TO ADDUCE AND
DURHAM’S MOTION TO AMEND HIS BRIEF IN SUPPORT AND FIRST MOTION
TO ADDUCE, AND FINRA’S REPLY IN SUPPORT OF ITS MOTION TO STRIKE**

Michael Garawski
Senior Vice President and
Director – Appellate Group

Michael Smith
Associate General Counsel

Celia L. Passaro
Associate General Counsel

FINRA
1700 K Street, NW
Washington, DC 20006
(202) 728-8985
ersilia.passaro@finra.org
nac.casefilings@finra.org

December 23, 2024

**BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC**

In the Matter of the Application of

Mark Kipling Durham

For Review of Action Taken by

FINRA

File No. 3-21981

**FINRA’S OPPOSITION TO DURHAM’S SECOND MOTION TO ADDUCE
AND MOTION TO AMEND HIS BRIEF IN SUPPORT AND FIRST MOTION TO
ADDUCE, AND FINRA’S REPLY IN SUPPORT OF ITS MOTION TO STRIKE**

Mark Kipling Durham moves to adduce his “General Affidavit,” which he previously improperly attached to his reply brief in support of his application for review and which FINRA moved to strike. Durham’s affidavit—which he offers as evidence of the terms of a 30-year-old offer of settlement that the parties are unable to locate—is not material to the decisive issue in this appeal: whether the Commission has jurisdiction to review FINRA’s action. Thus, the Commission should deny Durham’s motion to adduce and grant FINRA’s motion to strike the affidavit, and all references to it, because Durham has not met the standards of Commission Rule of Practice 452. The Commission should also deny Durham’s motion to amend his opening brief and first motion to adduce additional evidence because the proposed amendments rely on Durham’s affidavit.

I. Procedural and Factual Background

In June 2024, Durham submitted a statement of claim to FINRA’s Dispute Resolution Services (“DRS”) seeking to expunge a regulatory disclosure from his record in the Central Registration Depository (“CRD”[®]) and BrokerCheck[®]. RP 1-16.¹ The regulatory disclosure Durham seeks to expunge concerns a regulatory action commenced against Durham in 1992 by NASD alleging that Durham violated NASD rules in connection with recommendations of a government trust (the “1992 Regulatory Action”). RP 1-16, 38-39. The disclosure reflects that Durham settled the 1992 Regulatory Action in April 1994 through an order of offer of settlement, under which Durham “consented to . . . the entry of findings” and agreed to sanctions of a censure, \$5,000 fine, and five-day suspension from associating with any NASD member. RP 38-40.²

In a June 12, 2024 letter, DRS notified Durham that the DRS Director denied the arbitration forum for his expungement request pursuant to his authority under FINRA Rule 13203 because FINRA rules do not contemplate expungement of regulatory disclosures. RP 25. Durham filed an application for review of the Director’s denial with the Commission on July 12, 2024. RP 41-42.

¹ “RP __” refers to the page number in the certified record filed by FINRA on August 12, 2024. “Durham Br. at __” refers to Durham’s October 17, 2024 brief in support of his application for review. “Durham Motion at __” refers to Durham’s Motion to Adduce Additional Information. “FINRA’s Br. at __” refers to FINRA’s November 18, 2024 Brief in Opposition to Durham’s Application for Review and Motion to Adduce Additional Evidence. “Durham’s Reply at __” refers to Durham’s December 2, 2024 Reply to FINRA’s Brief in Opposition to the Application for Review and FINRA’s Opposition to the Motion to Adduce Additional Evidence. “FINRA’s Motion to Strike at __” refers to FINRA’s December 10, 2024 Motion to Strike Durham’s Affidavit.

² FINRA has been unable to locate the 30-year-old settlement document. FINRA’s Br. at 3, n.3.

On October 17, 2024, Durham filed with the Commission his brief in support of his application for review. Durham also filed a motion to adduce requesting admission of certain attached documents. These documents included an offer of settlement Durham purportedly submitted to NASD proposing to settle the 1992 Regulatory Action by accepting a letter of caution and a \$1,000 fine. *See* Exhibit 1 to Durham Motion.

FINRA opposed the motion to adduce the offer of settlement offered by Durham on the grounds that it is not material. FINRA Br. at 14-15. In doing so, FINRA pointed out that, among other things, “[t]here is no evidence this offer of settlement was accepted by NASD and therefore it is wholly irrelevant to this appeal.” FINRA Br. at 15. As FINRA explained, the 1992 Regulatory Action was ultimately settled when Durham consented to findings and agreed to a censure, a \$5,000 fine, and a five-business day suspension. RP 39-40. Thus, the offer of settlement offered by Durham could not have been the basis for the settlement.

On December 2, 2024, Durham filed a reply brief. In his reply, Durham concedes that the offer of settlement he moved to adduce “is not the final offer that was accepted by NASD,” and acknowledges that the final offer included a higher fine amount and a suspension. Durham Reply at 7 & n.35. Durham now claims, however, that he moved to adduce this offer of settlement “as evidence of the contents of the rest of the terms of the settlement itself.” *Id.* Durham also attached an affidavit to his reply brief. Durham Reply at 7, n.35. In the affidavit, Durham admits that “[t]he final [o]ffer of [s]ettlement is no longer available to [him].” He nonetheless represents that the missing final offer of settlement was “identical” to the offer of settlement he moves to adduce “except for the change of the fine to the amount of \$5,000 and the addition of a 5-day suspension” and that “all other terms were identical to those” in the one he moved to adduce.

On December 10, 2024, FINRA moved to strike Durham’s affidavit on the grounds that Durham had not moved to adduce the affidavit and, even if he had moved to adduce it, the affidavit is not relevant to the decisive issue on appeal and thus does not meet the standards of Rule of Practice 452.

In response, Durham filed his Opposition to FINRA’s Motion to Strike, a Second Motion to Adduce Additional Evidence (“Second Motion to Adduce”) requesting that the Commission admit Durham’s affidavit, and a Motion to Amend His Brief in Support and the First Motion to Adduce Additional Evidence (the “Motion to Amend”). In his Second Motion to Adduce, Durham argues that the affidavit “provide[s] additional explanation and context” for the non-final offer of settlement and indicates that the affidavit is offered for the purpose of establishing that the missing final offer of settlement “contain[ed] identical provisions” to the one he moved to adduce “apart from the fine amount and referenced suspension.” Second Motion to Adduce at 2. Durham’s affidavit, if admitted, would be the only evidence supporting Durham’s claims about the terms of the 30-year-old missing offer of settlement.

II. Argument

Under Commission Rule of Practice 452, the Commission may permit a party to introduce new evidence if the moving party shows with particularity that the evidence is material and that there were reasonable grounds for his failure to adduce such evidence previously. *Jack H. Stein*, 56 S.E.C. 108, 119 (2003); 17 C.F.R. 201.452. As explained in FINRA’s Motion to Strike, Durham has not satisfied the requirements of Rule 452 because his affidavit is not material to the decisive issue on appeal—whether the Commission has jurisdiction to review a denial of arbitration for a request to expunge a regulatory disclosure. As the Commission itself previously held, expungement of regulatory disclosures is not a service FINRA offers. *See*

Michael Andrew DeMaria, Exch. Act Release No. 97511, 2023 SEC LEXIS 1271 (May 16, 2023). Accordingly, FINRA did not prohibit or limit Durham's access to a service it offers, and there are no bases for Commission jurisdiction over this appeal pursuant to Exchange Act Section 19(d). *See* FINRA Br. at 4-9. Durham's arguments about the terms of his settlement with NASD are not relevant to whether the Commission has jurisdiction to hear this appeal. Jurisdiction turns on whether FINRA offers the service Durham seeks, not the terms on his settlement with NASD, including whether that settlement contained any waivers by Durham or findings of fact.

Even if the Commission admits the affidavit as evidence, Durham's Second Motion to Adduce and the Motion to Amend highlight the unreliability of his statements in the affidavit and therefore the Commission should not give the affidavit any weight. Durham's initial brief represented that the offer of settlement he sought to adduce was the basis for his settlement with NASD and that he had in fact settled the matter for a letter of caution and \$1,000 fine. *See* FINRA's Motion to Strike at 5. He now concedes that he was wrong; this offer of settlement was *not* the final resolution of NASD's claims, and he admits that "neither FINRA nor Mr. Durham have been able to locate the final [30-year-old] offer of settlement that resulted in the regulatory disclosure at issue." Second Motion to Adduce at 2. Durham nonetheless relies on this non-final offer of settlement to make claims about the terms of the missing final offer of settlement. To do so, Durham moves to adduce the affidavit in which he claims, incredibly, to recall the precise terms of a 30-year-old offer of settlement. Durham's claim is particularly implausible in light of his previous misrepresentation that the earlier non-final offer of settlement was his final settlement with NASD.

Durham's affidavit also contradicts the documentary evidence. In 1994, at the time of the settlement, NASD disclosed that pursuant to an order and offer of settlement with NASD, Durham had consented to the sanctions imposed and "the entry of findings." Thirty years later, Durham claims that he "did not accept or consent to any findings of fact." Second Motion to Adduce at 2. Yet the only support for this claim is Durham's own affidavit in which he claims to recall that the terms of the final settlement were identical to those of an earlier, non-final settlement.³

Durham states that he "takes issue" with FINRA for questioning the reliability of his statements in the affidavit, and he argues "it is perfectly reasonable" that he "would hold such a good and accurate memory" of the settlement of his claims with NASD. Durham's Opposition to FINRA's Motion to Strike at 4. But Durham's opening brief, which indisputably misstated the terms of his settlement with the NASD, shows that his memory is not "good and accurate." Nor does it make sense that Durham would have waited until after FINRA pointed out those misstatements in his brief for him to "remember" that actual final settlement and its terms. For all these reasons, Durham's assertions in the affidavit are unpersuasive, and if the Commission admits it, the affidavit should be given no weight.

III. Conclusion

Durham's affidavit is not material to the decisive issue on appeal—whether expungement of regulatory disclosures is a service FINRA's offers and thus the Commission has jurisdiction.

³ Durham's affidavit also contradicts NASD's rules at the time, which required an offer of settlement to contain a statement of consent to findings. *See Dist. Bus. Conduct Comm. v. Paul Z. Makris*, Complaint No. C05920017, 1993 NASD Discip. LEXIS 268, at *19 (NASD NBCC Mar. 3, 1993) ("We also note that the letter does not appear to be an Offer of Settlement, since it fails to comply with the requirements set forth in Article II, Section 11 of the Code, i.e., the letter does not describe the act or practice in which Makris engaged, the rule the act is alleged to have violated, and a statement of consent to findings.").

Because Durham has not demonstrated that he meets the standards to adduce additional evidence under Rule of Practice 452, the Commission should deny Durham's Second Motion to Adduce and strike the affidavit and all references to it in Durham's reply brief. The Commission should also deny Durhams's motion to amend his brief and first motion to adduce.


Respectfully submitted,


Celia L. Passaro
Associate General Counsel
FINRA
1700 K Street, NW
Washington, DC 20006
(202) 728-8985
ersilia.passaro@finra.org
nac.casefilings@finra.org

December 23, 2024

CERTIFICATE OF COMPLIANCE

I, Celia Passaro, certify that this motion complies with the Commission's Rules of Practice by filing a motion that omits or redacts any sensitive personal information described in Rule of Practice 151(e).



Celia L. Passaro
Associate General Counsel
FINRA
1700 K Street, NW
Washington, DC 20006
(202) 728-8985
ersilia.passaro@finra.org
nac.casefilings@finra.org

CERTIFICATE OF SERVICE

I, Celia L. Passaro, certify that on this 23rd day of December 2024, I caused a copy of the foregoing FINRA's Opposition to Durham's Second Motion to Adduce and Motion to Amend His Brief in Support and First Motion to Adduce, and FINRA's Reply in Support of Its Motion to Strike, in the matter of the Application for Review of Mark Kipling Durham, Administrative Proceeding File No. 3-21981, to be filed through the SEC's eFAP system.

And served by electronic mail on:

Peter Lindholm, Esq.
HLBS Law
390 Interlocken Crescent, Suite 350
Bloomfield, CO 80021
Legal.lindholm@hlbslaw.com
Peter.lindholm@hlbslaw.com


Celia L. Passaro
Associate General Counsel
FINRA
1700 K Street, NW
Washington, DC 20006
(202) 728-8985
ersilia.passaro@finra.org
nac.casefilings@finra.org